No. 98-9349

In the Supreme Court of the United States

October Term, 1998

STEVEN DEWAYNE BOND, PETITIONER,

v.

UNITED STATES OF AMERICA

Supreme Court, U.S.
FILED
MAY 10 1999
OFFICE OF THE CLERK

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES Petitioner Steven Dewayne Bond, by and through his undersigned attorney, and pursuant to Rule 39.1, Supreme Court Rules, and Title 18, United States Code, § 3006A(d)(6), respectfully moves this Honorable Court for leave to proceed *in forma pauperis,* and to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of fees. Petitioner was represented by appointed counsel under the Criminal Justice Act of 1964, as amended, in the district court and the court of appeals. Leave to proceed *in forma pauperis* was never sought in any other court.

Respectfully submitted.

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DATED: May 10, 1999.

(10)

QUESTIONS PRESENTED FOR REVIEW

1. Whether a search occurs when a law enforcement officer manipulates a bus passenger's personal carry-on luggage to determine its contents.
2. Whether the strict limits that this Court has set for an immigration checkpoint stop are violated by the detention of bus passengers so that their luggage may be manipulated to inspect for drugs.

No. _____

In the Supreme Court of the United States

October Term, 1998

STEVEN DEWAYNE BOND, PETITIONER,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Steven Dewayne Bond respectfully prays that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on February 8, 1999.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit, styled *United States v. Bond*, 167 F.3d 225 (5th Cir. 1999), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on February 8, 1999. This petition is filed within 90 days after entry of judgment. See SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Petitioner Steven Dewayne Bond was convicted of methamphetamine conspiracy and possession offenses. The district court exercised jurisdiction under 18 U.S.C. § 3231.

Bond was a passenger on a Greyhound bus that was stopped at the permanent immigration checkpoint at Sierra Blanca, Texas. The bus had

traveled from California through El Paso, Texas, and was en route to Arkansas.

Border Patrol Agent Cesar Cantu Jr. was on duty at the Sierra Blanca checkpoint when Bond's bus arrived. In accordance with his routine, the agent diverted the bus into the secondary traffic lane so that he could board it to conduct an immigration inspection.

The bus, which could accommodate at least 45 passengers, was nearly full. Agent Cantu worked his way to the back of the bus, checking the passengers' immigration status. Upon completion of his immigration inspection, Agent Cantu was satisfied that everyone on the bus was lawfully in the United States.

Rather than walking directly to the front of the bus and disembarking, Agent Cantu began working his way forward, stopping to feel and squeeze passengers' luggage to inspect for illegal drugs. Cantu manipulated carry-on luggage in the overhead bins, and under passengers' seats; he sometimes had to ask passengers to move so that he could reach the luggage under the seats.[1]

When Agent Cantu came to the row in which Bond was seated, he reached into the overhead bin above Bond's seat to manipulate a green

1. Agent Cantu could not remember whether the bins were open, or closed-type compartments with a door and a latch. He testified that, if the bins were of the closed-type, he would have required all of them to be opened so that he could feel bags stowed in the bins.

canvas bag. Nothing about Bond or Jason Wiggs, seated next to him, had drawn Cantu's attention. Cantu had simply squeezed the green canvas bag as part of his general effort to feel as many bags as he could.

The shape of a "brick-like" object that Agent Cantu felt in Bond's green canvas bag led him to suspect that it contained drugs. Cantu asked who owned the green bag, and Bond replied that the bag was his. When Cantu asked if he could open the bag, Bond said "go ahead."

Agent Cantu opened Bond's bag and found, wrapped inside a pair of pants, a brick-shaped object, covered in tape. The agent then determined that Wiggs was travelling with Bond, and he removed both men and their luggage from the bus. He found another brick-like object in Wiggs's luggage. Chemical field tests revealed that the objects contained methamphetamine.

Agent Cantu advised both men of their *Miranda* rights[2] and questioned them. Bond admitted that he possessed the methamphetamine and gave the agent details about how he had come to have the drugs. Wiggs too admitted guilt.[3] Each confessed again later, after another advisement of rights.

2. *Miranda v. Arizona*, 384 U.S. 436 (1966).

3. Wiggs was indicted with Bond, but Wiggs's motion to suppress evidence was granted. The district court found that Agent Cantu unlawfully arrested Wiggs because he had no reason to suspect Wiggs of wrong doing when he removed Wiggs and his luggage from the bus. App. B at 5–6. After Wiggs's motion to suppress was granted, the case against him was dismissed.

Bond filed a motion to suppress the methamphetamine and his confessions. The motion to suppress was denied, as was Bond's motion to reconsider it. Apps. B, C. He consented to a bench trial before the district court and was found guilty. Bond appealed.

On appeal, Bond argued that the agent's inspection of his luggage violated the Fourth Amendment in two ways. First, the agent's manipulation of Bond's carry-on luggage to determine whether it contained illegal drugs was a search, conducted without probable cause or consent. Second, the detention of the bus and its passengers after the immigration inspection was concluded exceeded the strict limits for permanent checkpoint inspections that were set by this Court in *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976).

The U.S. Court of Appeals for the Fifth Circuit rejected both of these contentions. The court held that Agent Cantu's manipulation of Bond's luggage was not a search for Fourth Amendment purposes. 167 F.3d at 227. It also ruled that "[w]e do not read *Martinez-Fuerte* to mean that once Agent Cantu reached the back of the bus, he was required to jump out a window or sprint back to the front of the bus and jump out the door." *Id.* at 228. It therefore decided that Cantu was permitted to squeeze and feel luggage on his way out of the bus to inspect for drugs. The court concluded that neither the delay caused by Cantu's inspection nor the manipulation of luggage violated the strict limits of a permanent checkpoint stop. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DIVIDED ABOUT WHETHER A SEARCH OCCURS WHEN A LAW ENFORCEMENT OFFICER MANIPULATES A BUS PASSENGER'S CARRY-ON LUGGAGE TO DETERMINE ITS CONTENTS.

In a relatively new tactic in the war on drugs, police officers board commercial buses while they are stopped at a terminal and inspect the passengers' luggage for illegal drugs. Without consent, probable cause, or even reasonable suspicion of criminal activity, the officers squeeze, feel, and manipulate the personal carry-on luggage of bus passengers in search of suspicious shapes or objects that may indicate the presence of drugs.[4]

Federal border patrol agents have followed suit. When commercial buses are stopped at a permanent checkpoint for a routine immigration inspection, agents take the opportunity to feel and squeeze passengers' luggage in search of illegal drugs. The Fifth Circuit Court of Appeals approved this practice in Bond's case, ruling that the manipulation of a passenger's personal carry-on luggage to determine if it contains illegal drugs does not constitute a search within the meaning of the Fourth Amendment. Thus, agents need neither probable cause nor even reasonable suspicion to squeeze and feel luggage to determine its contents. *United States v. Bond,* 167 F.3d 225, 227

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4. See *United States v. Nicholson,* 144 F.3d 632 (10th Cir. 1998) (Oklahoma City police board Greyhound bus during regularly scheduled stop and manipulate luggage in overhead bins as part of drug interdiction effort); *United States v. McDonald,* 100 F.3d 1320 (7th Cir. 1996) (Indianapolis police do same), *cert. denied,* 520 U.S. 1258 (1997).

(5th Cir. 1999); *accord United States v. McDonald,* 100 F.3d 1320, 1322, 1324–27 (7th Cir. 1996) (police officer's "pushing and feeling" of bags in overhead bins of Greyhound bus not a search under Fourth Amendment), *cert. denied,* 520 U.S. 1258 (1997).

The Tenth Circuit disagrees. Condemning what it termed the "suspicionless police sweep of a bus in interstate travel," that court has held that a police officer's manipulation of luggage to determine whether it contained drugs is a "search" subject to Fourth Amendment constraints. *United States v. Nicholson,* 144 F.3d 632, 638–40 (10th Cir. 1998); *cf. United States v. Most,* 876 F.2d 191, 194, 197–99 (D.C. Cir. 1989) (police officer's investigative touching of shopping bag checked with store was search).

Because the courts of appeals are in conflict about whether a search occurs when a law enforcement officer manipulates a traveler's personal carry-on luggage, this Court should grant certiorari. This issue has broad application and implicates fundamental questions about the important protections afforded by the Fourth Amendment to the United States Constitution.

A. A Search Occurs When a Border Patrol Agent Feels and Squeezes Carry-On Luggage to Determine Its Contents.

The Fourth Amendment protects the "right of the people to be secure in their . . . effects, against unreasonable searches." U.S. CONST. amend. IV. For purposes of the Fourth Amendment, a search occurs when

government officials infringe upon an individual's legitimate expectation of privacy. *See United States v. Jacobson,* 466 U.S. 109, 120 (1984). As this Court has explained, "application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland,* 442 U.S. 735, 740 (1979) (internal citations omitted).

Travelers, like Bond, have a legitimate expectation of privacy in their personal luggage, an expectation that the Fourth Amendment protects. *See United States v. Chadwick,* 433 U.S. 1, 13 (1977) (expectation of privacy in luggage as repository of personal effects), *abrogated on other grounds, California v. Acevedo,* 500 U.S. 565 (1991).[5] The Fifth Circuit concluded that Bond gave up any reasonable expectation of privacy in his carry-on bag because he "exposed it to the public" by placing it in the luggage bin directly over his head. 167 F.3d at 227. In the Fifth Circuit's view, Bond "did not have a reasonable expectation that his bag would not be handled or manipulated by others." *Id.*

---

5. In *Acevedo,* this Court analyzed inconsistent Supreme Court authority governing the search of containers in automobiles—authority that included the *Chadwick* case. 500 U.S. at 561–80. It announced the new rule that "[t]he police may search automobiles and the containers within it where they have probable cause to believe contraband or evidence is contained." 500 U.S. at 580.

The Fifth Circuit's holding appears contrary to fundamental constitutional principles. The Fourth Amendment protects people, not places or even things. *See Katz v. United States,* 389 U.S. 347, 351 (1967). Thus, what a person "seeks to protect as private, even in an area accessible to the public, may be constitutionally protected." *Id.* By placing his personal carry-on luggage directly over his seat, in the internal baggage compartment of a Greyhound bus, Bond manifested his reasonable and legitimate expectation that the contents of his luggage would remain private.[6]

Of course, placing a bag in an overhead luggage bin of a Greyhound bus will expose it to certain intrusions. Other passengers may push and move the bag as they try to make room for their own belongings. However, Agent Cantu's squeezing and feeling of Bond's bag to determine whether it contained drugs was not the sort of handling that Bond would reasonably expect from other passengers. No traveler on a common carrier expects that other passengers will feel and squeeze his luggage to determine its contents. *See Nicholson,* 144 F.3d at 639 (bus traveler had reasonable expectation that police would not manipulate carry-on luggage to determine its contents); *Most,* 876 F.2d at 195–97 & n.13 (grocery store shopper had reasonable

6. There was testimony in the district court that the luggage bin was a closed-type bin, similar to those found in airplanes. The Fifth Circuit found that the "record is unclear as to whether the . . . bin was of the open or closed type." 167 F.3d at 227 n.1. However, the court concluded that "since both types of bins were accessible to the general public . . . the distinction between open and closed luggage bins is irrelevant for Fourth Amendment purposes." *Id.*

expectation that police would not use "crush technique" to feel drugs inside bag checked with clerk).

Agent Cantu's probing hands invaded Bond's carry-on luggage and revealed its contents. The agent felt and squeezed the contents of Bond's bag hard enough to know that the bag contained a brick-like object with "an outline of something of different mass inside of it"—an object Cantu believed to contain drugs. Thus, at least one item in Bond's luggage—a brick-like object that Cantu believed to contain drugs—was revealed through the agent's sense of touch.

Squeezing or manipulation such as that undertaken by Agent Cantu could have revealed the presence of books, magazines, a compact disc player or radio, eye glasses, clothing, medicine containers, a package of cigarettes, a pipe, a hair brush, comb, or other toiletry items, or a myriad of other objects commonly found in personal hand luggage. As this Court has observed, "[a] search is a search," and "it matters not that the search uncovered nothing of any great personal value" to the person searched. *Arizona v. Hicks,* 480 U.S. 321, 325 (1987). Agent Cantu's manipulation of Bond's carry-on luggage was a search that revealed the bag's contents, including a brick-like object that was later found to contain drugs.

In sum, Agent Cantu's manipulation of Bond's carry-on baggage to discover its contents was a search because it invaded a legitimate expectation of privacy. A traveler who checks his bags with a commercial carrier may

expect that his bags will receive rough handling. A traveler who keeps his bags with him while he travels may expect the more minimal handling that occurs if fellow travelers have to move luggage to make room for their own. No traveler, however, expects that others will squeeze or feel his carry-on luggage in a manner that is intended to reveal the contents of that luggage. When a government agent boards a Greyhound bus, reaches into baggage bins and under seats, and conducts an inspection of luggage by squeezing passengers' bags, he invades the legitimate expectation of privacy that a person has in his personal luggage and its contents.

B. Certiorari Should be Granted Because of the Importance of the Issue and Disagreement Among the Circuits.

By its decision in Bond's case, the Fifth Circuit joined the Seventh Circuit in holding that no search occurs when a law enforcement officer manipulates a traveler's personal carry-on luggage to determine its contents. See *McDonald,* 100 F.3d at 1327. The Tenth Circuit has held to the contrary. In *Nicholson,* that court ruled that a law enforcement officer's manipulation of a carry-on bag to inspect for drugs is a search within the meaning of the Fourth Amendment. 144 F.3d at 639.[7]

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7. The salient facts of all three cases, *Bond, Nicholson,* and *McDonald*, are nearly identical: all three were travelers on a Greyhound bus; all had their carry-on luggage manipulated by law enforcement officers looking for drugs; all the initial drug inspections were conducted without reasonable suspicion, probable cause, or consent.

The importance of this issue was aptly summed up by Seventh Circuit Judge Ripple as "a milestone in the unfolding of . . . Fourth Amendment jurisprudence[.]" *McDonald,* 100 F.3d at 1333 (Ripple, J., dissenting). And the "practical consequences" of the issue "are no less substantial than the doctrinal ones." *Id.* "From now on, law enforcement officials" in the Fifth and Seventh Circuits, "without probable cause, or even reasonable suspicion, may walk throughout public buses and trains and randomly manipulate closed luggage to determine its contents." *Id.* Judge Ripple and the Tenth Circuit believe that "the Fourth Amendment protects people in the United States from such an intrusion into their personal belongings." *Id.* at 1229; *see Nicholson,* 144 F.3d at 639–40. The Fifth and Seventh Circuits do not. This Court should grant certiorari to settle this dispute among the circuits and to clarify this important Fourth Amendment issue.

II. This Case Presents the Important Federal Question Whether the Strict Limits Attending Immigration Checkpoint Stops Are Exceeded, and the Fourth Amendment Violated, When Government Agents Detain Travelers to Inspect Their Luggage for Drugs.

In *United States v. Martinez-Fuerte,* 428 U.S. 543, 558 (1976), this Court approved brief stops of vehicles at fixed checkpoints to allow limited questioning of passengers about immigration matters. The brief detention may last only long enough to ask questions and check citizenship status. *See id.* As Agent Cantu's testimony showed, border patrol agents routinely exceed *Martinez-Fuerte*'s strict limits at the Sierra Blanca checkpoint by

extending the detention of bus passengers in order to inspect their luggage. The agents inspect luggage both under seats and in overhead bins by squeezing it to determine whether it contains drugs. If the overhead bins are closed, the agents open them so they can reach all of the passengers' carry-on luggage.

Martinez-Fuerte imposed strict limits on stops at immigration check-points. It did so because *Martinez-Fuerte* created an exception to the general rule that the seizure of a person must be based on reasonable suspicion. As a general matter, law enforcement officers must have a particularized and reasonable suspicion that an individual is engaged in criminal activity before they may require a person to stop and answer questions. *See Terry v. Ohio*, 392 U.S. 1, 21 & n.18 (1968). In *Martinez-Fuerte*, however, this Court approved stops at permanent immigration checkpoints, without reasonable suspicion, because the need for enforcement of immigration laws was great, and the intrusion on the rights of private citizens was modest. *See* 428 U.S. at 560–62.

Thus, checkpoint detentions without reasonable suspicion comport with the Fourth Amendment only if they comply with *Martinez-Fuerte*'s strict limits. *See* 428 U.S. at 566–67 ("The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop."). The limits imposed by this Court were that the detention be brief, and that the requirements imposed on passengers be limited to a

"question or two and possibly the production of a document evidencing a right to be in the United States." *Id.* at 558. The Court forbade "any further detention" without consent or probable cause. *Id.* at 567.

In this case, the detention was not brief, and the requirements imposed on passengers were not limited to questions about immigration matters. After the sanctioned immigration inspection was completed, a busload of about 45 passengers was detained while a border patrol agent worked his way through the bus, squeezing as many bags as he could to determine if there were drugs on board. Passengers were also required to move out of his way, so that the agent could inspect carry-on luggage stored under their seats; luggage stored overhead also was manipulated to determine its contents.

The Fifth Circuit ruled that the agent's actions did not violate the Fourth Amendment because the luggage inspection caused only a trivial delay. 167 F.3d at 228. Further the court reasoned that, as the bus had no rear exit, Agent Cantu was not "required to jump out a window or sprint back to the front of the bus and jump out the door." *Id.*

Bond contends that this ruling does not comport with *Martinez-Fuerte*'s strict limits; instead, the Fifth Circuit has effectively expanded the narrow scope of a permanent checkpoint stop. This Court should grant certiorari to address this important question of federal law.

CONCLUSION

Petitioner Bond asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

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DATED: May 10, 1999.

APPENDIX A

United States v. Bond,
167 F.3d 225 (5th Cir. 1999)

546. Accordingly, the district court did not err in this regard.

VI. CONCLUSION

Based on the foregoing, we VACATE the appellants' convictions for wire fraud under counts three and four, but AFFIRM the appellants' remaining convictions. We also VACATE the appellants' sentences and REMAND to the district court for resentencing consistent with this opinion.

UNITED STATES of America, Plaintiff–Appellee,

v.

Steven Dewayne BOND, Defendant–Appellant.

No. 98–50074.

United States Court of Appeals, Fifth Circuit.

Feb. 8, 1999.

Defendant was convicted in the United States District Court for the Western District of Texas, Harry Lee Hudspeth, Chief Judge, of conspiracy to possess and possession with intent to distribute methamphetamine, and he appealed, challenging denial of his suppression motion. The Court of Appeals, Duhe, Circuit Judge, held that: (1) Border Patrol agent did not subject defendant's bag to a search for Fourth Amendment purposes when he squeezed bag while conducting immigration inspection of bus in which defendant was a passenger, and (2) agent did not violate limitations on border checkpoint stops.

Affirmed.

1. Criminal Law ⇐1139, 1158(4)

In reviewing a district court's denial of a defendant's motion to suppress, Court of Appeals reviews factual findings for clear error and conclusions of law de novo.

2. Criminal Law ⇐1144.12

In reviewing a district court's denial of a defendant's motion to suppress, Court of Appeals reviews the evidence in the light most favorable to the prevailing party.

3. Searches and Seizures ⇐13.1

Border Patrol agent did not subject defendant's bag to a search for Fourth Amendment purposes when he squeezed bag while conducting immigration inspection of bus in which defendant was a passenger, where bag had been placed in overhead luggage bin which was accessible to the general public. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐13.1

Border Patrol agent's manipulation of bags stored in bus' overhead luggage bin in a manner calculated to detect contraband while he conducted immigration inspection of bus in which defendant was a passenger did not make his manipulation of defendant's bag a search for Fourth Amendment purposes, although other passengers would not have manipulated the bag in the same way. U.S.C.A. Const.Amend. 4.

5. Customs Duties ⇐126(4)

Border Patrol agent who conducted immigration inspection of bus at border checkpoint did not violate limitations on border checkpoint stops when he squeezed luggage in overhead luggage bin on his out of the bus after concluding that all passengers were lawfully in the United States, where bus had no rear exit and agent's inspection of the luggage on his way to the front of the bus delayed its departure by only one or two minutes. U.S.C.A. Const.Amend. 4.

6. Customs Duties ⇐126(4)

Border Patrol agent conducting immigration inspection of bus at border checkpoint could conduct tactile, rather than visual inspection of luggage in overhead luggage bin without exceeding limits of border checkpoint stops. U.S.C.A. Const.Amend. 4.

Joseph H. Gay, Jr., U.S. Atty., Margaret Feuille Leachman, San Antonio, TX, for Plaintiff–Appellee.

M. Carolyn Fuentes, San Antonio, TX, for Defendant–Appellant.

Appeal from the United States District Court for the Western District of Texas.

Before KING, Chief Judge, and DUHÉ and DeMOSS, Circuit Judges.

DUHÉ, Circuit Judge:

Drugs were found in Appellant's luggage at a border checkpoint. He appeals the denial of his Motion to Suppress. We affirm.

BACKGROUND

Stephen DeWayne Bond ("Bond") was a passenger on a Greyhound bus that was stopped at the permanent Border Patrol checkpoint at Sierra Blanca, Texas. Border Patrol Agent Cesar Cantu ("Agent Cantu") diverted the bus into the secondary checkpoint traffic lane to conduct an immigration inspection.

Agent Cantu checked the immigration status of the passengers as he worked his way toward the back of the bus. After he reached the back of the bus and was satisfied that the passengers were lawfully in the United States, Agent Cantu walked back toward the front of the bus. As he did so, he began feeling and squeezing passengers' luggage in the overhead compartments.

As Agent Cantu inspected the luggage in the compartment above Bond's seat, he squeezed a green bag and noticed that the bag contained a "brick-like" object. Bond admitted that the bag was his and consented to its search. While searching the bag, Agent Cantu discovered a "brick" of methamphetamine. After Bond was advised of his *Miranda* rights, Bond admitted that he was transporting the methamphetamine to Little Rock, Arkansas.

Bond was indicted for conspiracy to possess and possession with intent to distribute methamphetamine. Contending that Agent Cantu conducted an illegal search, Bond unsuccessfully moved to suppress the methamphetamine and for reconsideration. Bond waived a jury trial and the district court found Bond guilty on both counts of the indictment and sentenced him to 57 months imprisonment. Bond appeals the denial of his motion to suppress.

DISCUSSION

[1, 2] In reviewing a district court's denial of a defendant's motion to suppress, we review factual findings for clear error and conclusions of law *de novo*. *See United States v. Carrillo-Morales*, 27 F.3d 1054, 1060–61 (5th Cir.1994). We review the evidence in the light most favorable to the prevailing party. *United States v. Ishmael*, 48 F.3d 850, 853 (5th Cir.1995).

Bond consented to the search of the inside of his bag, therefore, we consider only whether Agent Cantu violated Bond's Fourth Amendment rights prior to Bond's consent to the search. For the following reasons, we conclude that Agent Cantu did not.

I. Whether Squeezing Bond's Luggage Constituted a Search for Fourth Amendment Purposes?

[3] "Government action amounts to a search when it infringes an expectation of privacy that society is prepared to accept as reasonable." *U.S. v. McDonald*, 100 F.3d 1320, 1324 (7th Cir.1996), *cert. denied*, 520 U.S. 1258, 117 S.Ct. 2423, 138 L.Ed.2d 186 (1997) (citing *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984)). However, "[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).

Bond insists that Agent Cantu's manipulation of his bag constituted a search for Fourth Amendment purposes. We disagree. Bond stored his bag in the overhead luggage bin of a Greyhound bus.[1] The bin was a

1. The record is unclear as to whether the overhead luggage bin was of the open or closed type. Both types of bins are accessible to the general public. Therefore, we conclude that the distinc-

common area of the bus, and it was foreseeable that his bag would be squeezed, moved, and manipulated by others. On common carriers, passengers often handle and manipulate other passengers' luggage while stowing or retrieving their own luggage. By placing his bag in the overhead bin, Bond knowingly exposed it to the public and, therefore, did not have a reasonable expectation that his bag would not be handled or manipulated by others.[2] *See McDonald*, 100 F.3d at 1327 (holding that officer's manipulation of bags on the overhead rack of a Greyhound bus was not a search because the defendant "did not have a legitimate expectation that her luggage left in such a place would not be handled by others."); *U.S. v. Guzman*, 75 F.3d 1090, 1095 (6th Cir.1996) (holding that the defendant did not have a reasonable expectation of privacy in the exterior of a bag that he placed on the luggage rack of a Greyhound bus); *United States v. Harvey*, 961 F.2d 1361, 1364 (8th Cir.1992) (stating that "[p]assengers have no objective, reasonable expectation that their baggage will never be moved once placed in an overhead compartment."); *see also United States v. Lovell*, 849 F.2d 910, 915 (5th Cir.1988) (holding that manipulation of the defendant's baggage on an airport baggage carousel was not a search because the defendant did not have a reasonable expectation that the baggage would not be moved or handled); *but see United States v. Nicholson*, 144 F.3d 632, 639 (10th Cir.1998) (holding that the manipulation of luggage stored in an overhead luggage bin was a search within the meaning of the Fourth Amendment).

[4] Conceding that other passengers had access to his bag, Bond contends that Agent Cantu's actions constituted a search because Agent Cantu manipulated his bag in a different way than other passengers would. *See U.S. v. Nicholson*, 144 F.3d 632, 639 (10th Cir.1998) (reasoning that manipulation of the defendant's bag constituted a search because detectives squeezed the bag in a way that revealed more about the bag's contents than manipulation by other passengers may have). We reject this argument. The fact that Agent Cantu's manipulation of Bond's bag was calculated to detect contraband is irrelevant for Fourth Amendment purposes. In *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 1813–14, 90 L.Ed.2d 210 (1986), the Supreme Court held that a defendant who grew marijuana plants in his backyard knowingly exposed those plants to aerial observation. The Court observed that the fact that "the observation from [the] aircraft was directed at identifying the plants and the officers were trained to recognize marijuana [was] irrelevant." *Id.* at 1813. Accordingly, we hold that Agent Cantu's manipulation of Bond's bag was not a search within the meaning of the Fourth Amendment.

II. *Whether the Luggage Inspection at the Checkpoint Exceeded the Limits Imposed by United States v. Martinez-Fuerte?*

[5] Bond insists that the continued detention of the bus and its passengers after the immigration inspection was completed exceeded the strict limits for such inspections set forth by the Supreme Court in *United State v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). He argues that detentions may last only long enough to ask questions and check citizenship status. *See United States v. Jackson*, 825 F.2d 853, 862 (5th Cir.1987). Noting that the *Martinez-Fuerte* Court forbade further detention without consent or probable cause, Bond maintains that Agent Cantu's luggage inspection occurred after he concluded that all passengers on the bus were lawfully in the United States and was, therefore, impermissible. *See Martinez-Fuerte*, 96 S.Ct. at 3087.

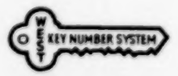
We reject Bond's reading of *Martinez-Fuerte*. In the case at bar, the bus had no rear exit and Agent Cantu inspected the luggage compartment during his return to the front of the bus. There is no evidence that Agent Cantu's inspection of the overhead luggage compartment delayed the bus' departure more than an additional one or two minutes.[3] We do not read *Martinez-Fuerte* to mean that once Agent Cantu reached the back of the bus, he was required to jump out a window or sprint back to the front of the bus and jump out the door. Therefore, we conclude that the trivial delay caused by Agent Cantu's inspection did not violate the strict limits of a border checkpoint stop. *See United States v. Muniz-Melchor*, 894 F.2d 1430, 1432, 1436–37 (5th Cir.1990) (tapping on the side of a truck's propane tank at a checkpoint was permissible even though the driver had already produced valid documentation).

[6] Although Bond concedes that *Martinez-Fuerte* allows a visual inspection of areas that can be seen without a search, he contends that Agent Cantu's inspection was impermissible because it went beyond a visual inspection of the bus. *See Martinez-Fuerte*, 96 S.Ct. at 3083 (stating that, in a border checkpoint stop, "[n]either the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search."). We disagree. We have repeatedly permitted checkpoint inspections that were not visual but did not constitute searches. *See, e.g., United States v. Hernandez*, 976 F.2d 929, 930 (5th Cir.1992) (permitting dog sniff at checkpoint); *Muniz-Melchor*, 894 F.2d at 1435–37 (holding that tapping on the side of a truck's propane tank at a checkpoint was permissible). Because Agent Cantu's inspection was not a search, the fact that it was tactile rather than visual did not make it impermissible.

CONCLUSION

We affirm the denial of Bond's motion to suppress.

AFFIRMED.



tion between open and closed luggage bins is irrelevant for Fourth Amendment purposes.

2. We have upheld similar searches in two unpublished opinions,. *See United States v. Cook*, 992 F.2d 323, 1993 WL 152244 (5th Cir.1993); *United States v. Wilson*, 987 F.2d 770, 1993 WL 67230 (5th Cir.1993); *see* 5th Cir. R. 47.5.3.

3. In fact, the entire stop lasted only between five and ten minutes.

Marie PFAU, Plaintiff-Appellant,

v.

William REED, In His Official Capacity as Director of the Defense Contract Audit Agency, Defendant-Appellee.

No. 96-50916.

United States Court of Appeals,
Fifth Circuit.

Feb. 8, 1999.

Former employee sued director of federal agency and others for sexual harassment and intentional infliction of emotional distress. The United States District Court for the Western District of Texas, Alan D. Albright, United States Magistrate Judge, granted summary judgment for director. Employee appealed. The Court of Appeals, King, Circuit Judge, 125 F.3d 927, affirmed. Employee sought review. The Supreme Court, — U.S. —, 119 S.Ct. 32, 142 L.Ed.2d 24, vacated judgment and remanded. The Court of Appeals held that District Court would be required on remand to reconsider, in light of recent United States Supreme Court decisions, whether certain co-employee was employee's supervisor, and, if so, whether employer established affirmative defense outlined in those cases.

Affirmed in part; vacated and remanded in part.

Federal Courts ⇐943.1

District court would be required on remand to reconsider, in light of United States Supreme Court decisions in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, whether certain co-employee was employee's supervisor, and, if so, whether employer established affirmative defense to claim of employer's liability for sexual harassment outlined in those cases. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

APPENDIX B

District Court's Order Regarding
Defendants' Motions to Suppress Evidence,
October 23, 1997

FILED
97 OCT 23 A 9:30
CLERK, U.S. DISTRICT
BY

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	§	
	§	
v.	§	No. EP-97-CR-682-H
	§	
STEVEN DEWAYNE BOND	§	
JASON MICHAEL WIGGS	§	

ORDER REGARDING DEFENDANTS' MOTIONS TO SUPPRESS EVIDENCE

Defendants Steven Dewayne Bond and Jason Michael Wiggs are charged in a two-count indictment with conspiring to possess methamphetamine and possession of methamphetamine with intent to distribute it. Both Defendants have filed motions to suppress as evidence all fruits of the search of their personal belongings at the Sierra Blanca checkpoint on July 17, 1997. Both Defendants also move to suppress as evidence the statements or confessions attributed to them following their arrest, contending that these are fruits of the poisonous tree.

The testimony of the witnesses at the evidentiary hearing was in conflict. The Court, in its role as fact finder, has been required to make findings of fact as to exactly what occurred. These findings of fact are reflected in the opinion that follows.

Cesar Cantu is a Border Patrol agent stationed at Sierra Blanca, Texas. On July 17, 1997, he was on duty at the Sierra Blanca checkpoint, a Border Patrol checkpoint located on Interstate 10 approximately 85 miles east of El Paso, Texas. At approximately 7:55 p.m. on that date, a Greyhound bus from El Paso arrived at the checkpoint. Agent Cantu got on the bus to check the citizenship or other status of its occupants. He went row by row to the back of the bus, and discovered no undocumented aliens. On his way back to

the front of the bus, Agent Cantu checked the luggage racks above the heads of the seated passengers. This check was not visual only; on occasion he reached in with his hand and felt the suitcases, clothing bags, backpacks, or other items contained in the luggage rack. Four or five rows from the rear of the bus, Agent Cantu felt a bricklike object in a softsided green cloth bag. Based on his experience, he thought the bricklike object might be a package of drugs. He immediately asked to whom the green bag belonged. Defendant Steven Dewayne Bond, who was seated in an aisle seat immediately below the green bag, admitted that the bag was his. Bond also struck Agent Cantu as acting somewhat nervous. Agent Cantu asked Bond for consent to search the bag, and Bond gave his consent. Cantu unzipped the green bag and looked inside. Inside the leg of a pair of pants, he found the bricklike object he had felt. Closer examination revealed an oval mass, wrapped in gray duct tape with rounded corners, six or seven inches long by four or five inches wide. Agent Cantu then asked the passenger in the window seat, Defendant Wiggs, whether he was travelling with Bond. Wiggs said that he was. Cantu then removed a backpack from the luggage rack and asked if it belonged to Wiggs. Wiggs said that it did. Agent Cantu then directed both Bond and Wiggs to get off the bus with the two bags. The two young men were turned over to another Border Patrol agent while Agent Cantu completed his inspection of the bus. At that time, the two young men were taken inside the office for questioning. The bus driver was cleared to leave, and the Greyhound bus proceeded on its way. Agent Cantu

came inside the office and confronted the two Defendants. He asked Wiggs for consent to search his backpack, and Wiggs gave it. Inside the backpack was another bricklike object, similar to the one found in Bond's bag. Some of the contents were field tested, and proved positive for methamphetamine. Each brick weighed approximately 1.3 pounds. Agent Cantu then advised both Defendants of their constitutional rights, and they agreed to answer questions. Defendant Bond did most of the talking. He said he was travelling from California to Little Rock, Arkansas, and was transporting the methamphetamine on behalf of a person named Tony Alvarez whom he knew in California. He was to deliver the methamphetamine to someone at a Holiday Inn motel in Little Rock, return to California, and be paid. He admitted that he knew that the bricks contained methamphetamine. Defendant Wiggs did not do much talking. He mostly nodded assent as Bond did the talking. He said nothing to contradict the story being told by Bond.

Agent Cantu contacted the office of the Drug Enforcement Administration in El Paso, and an agent responded to the checkpoint. He reinterviewed the Defendants, and obtained a similar story. Defendant Bond stated that an acquaintance in Merced, California named Tony Alvarez learned that Bond was travelling to Little Rock to visit relatives. Alvarez requested Bond to transport the methamphetamine for a fee. Bond gave his pager to Tony Alvarez, and the understanding was that Bond would "beep" Tony upon his arrival in Little Rock, Arkansas. This time Defendant Wiggs gave a separate statement, admitting that he was

knowingly transporting methamphetamine on behalf of Tony Alvarez. He was present at Bond's residence when the parties agreed to the plan, and he heard all of Alvarez' instructions to Bond. Both Defendants were taken into custody and returned to El Paso where they were later indicted.

There is no question that the initial inspection of the bus by Border Patrol Agent Cantu was legitimate and routine. Agents of the Border Patrol have the authority within 100 miles of the international boundary to stop vehicles at checkpoints and verify the citizenship and/or legal status of their occupants. 8 U.S.C. § 1357(a)(3). In the course of making that inspection, Agent Cantu was authorized to look in the luggage compartments as well. In the process, he felt the outside of Bond's softside green cloth bag. In doing so, he felt the presence of a solid mass reminiscent of a brick. **See: United States v. Karman,** 849 F.2d 928, 929 (5th Cir. 1988). It is well settled that the minimally intrusive touching of the exterior of a bag located in the luggage compartment of a common carrier is neither a search nor a seizure within the meaning of the Fourth Amendment. **United States v. Lovell,** 849 F.2d 910 (5th Cir. 1988); **United States v. Garcia,** 849 F.2d 917 (5th Cir. 1988). Agent Cantu then asked a question about ownership, and Bond replied that the bag was his. Agent Cantu requested Bond's consent to a search of the bag, and Bond gave it. A search by consent is a well recognized exception to the usual warrant requirement. **Schneckloth v. Bustamonte,** 412 U.S. 218 (1973). The Court finds from a preponderance of the evidence that Bond's consent to the

search of his bag was voluntary. **United States v. Hurtado,** 905 F.2d 74 (5th Cir. 1990) (en banc). Although Bond testified at the hearing on his motion to suppress evidence, he did not really contend that his consent was not voluntary. All he could do was to express his belief that Agent Cantu would have obtained a search warrant if he had not consented. Once the brick was found, Agent Cantu had probable cause to arrest Bond.

After the discovery of the drug inside his bag, Bond confessed not once but twice. Both confessions were preceded by the administration of proper warnings concerning his constitutional rights. Bond has shown nothing to render his post-arrest statements inadmissible. Therefore, his motion to suppress both the methamphetamine and his post-arrest statements must be denied.

The case of Defendant Wiggs is a horse of a different color. The Court finds from the evidence that Wiggs was taken off the Greyhound bus and inside the Border Patrol office before the methamphetamine was discovered inside his backpack. Furthermore, the bus driver was cleared to leave the checkpoint, and the bus was driven away. At that point, Agent Cantu had effected a custodial arrest, which required probable cause. Compare **United States v. Bengivenga**, 845 F.2d 593 (5th Cir. 1988)(en banc), **cert. denied** 488 U.S. 924 (1988). However, Cantu did not possess probable cause to arrest Wiggs. With the departure of the bus, Defendant Wiggs was left stranded at a remote location, a million miles from nowhere, with no company other than his handcuffed friend and the polite but unsympathetic Border Patrolmen. Everything that followed,

including his alleged "consent" to the search of his backpack and the post-arrest statements he gave were the product of his illegal arrest. **Brown v. Illinois,** 422 U.S. 590 (1975); **Wong Sun v. United States,** 371 U.S. 471 (1963). Between the time of his arrest and the time of his last confession, there were no intervening events or circumstances which purged the primary taint. Therefore, the motion of Defendant Wiggs to suppress as evidence the methamphetamine found in his backpack and his post-arrest statements must be granted.

It is therefore ORDERED that the motion of Defendant Bond to suppress evidence in the above-styled and numbered cause be, and it is hereby, DENIED.

It is further ORDERED that the motion of Defendant Wiggs to suppress all fruits of the arrest, search and seizure at the Sierra Blanca checkpoint on July 17, 1997, including any post-arrest statements attributed to him, be, and it is hereby, GRANTED, and both the methamphetamine and his post-arrest statements be, and they are hereby, SUPPRESSED as evidence against him in his case.

SIGNED AND ENTERED this 23d day of October, 1997.

HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

APPENDIX C

District Court's Order Denying Motion for Reconsideration, November 13, 1997

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	§	
	§	
v.	§	No. EP-97-CR-682-H
	§	
STEVEN DEWAYNE BOND	§	

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

Defendant Steven Dewayne Bond previously filed a motion to suppress evidence in this case. Through his motion, Bond was seeking to suppress a quantity of methamphetamine and his confession. On October 23, 1997, the Court denied the motion to suppress evidence. Bond has now filed a motion for reconsideration of that order.

In his motion for reconsideration, the Defendant suggests that Border Patrol Agent Cantu violated his Fourth Amendment rights "by detaining the bus in which Defendant . . . was travelling, so that he could perform a suspicionless inspection of the travellers' overhead luggage in the bus?" (Motion to reconsider, page 1). Specifically, the Defendant states that he wants the Court to review "the scope of the official detention **before** Agent Cantu discovered the oval brick to determine whether it was reasonable under the Fourth Amendment . . .." (Motion to reconsider, page 3).

The undisputed evidence at the hearing on the motion to suppress evidence showed that a Greyhound Bus from El Paso arrived at the Sierra Blanca checkpoint at 7:55 p.m. on July 17, 1997. Border Patrol Agent Cantu got on the bus to check the citizenship or other status of its passengers. He started at the front of the bus and moved toward the back, questioning the passengers in each row of seats as he came to that row. When Agent Cantu reached the back of the bus, he looked in the bathroom, where some individual could have been hiding. He then turned around and headed for the front of the bus. As he did so, he looked in the luggage storage compartment located above the seats. As he came to the Defendant's row, something about a softsided green cloth bag in the overhead compartment attracted his attention. He touched the outside of the bag, and could feel a bricklike object. Thinking on the basis of his experience that this might be a package of drugs, he began asking questions of the nearby passengers. This led to the discovery of the fact that Defendant Bond was the owner of the bag and was transporting controlled substances.

This brief review of the evidence demonstrates the far-fetched nature of the Defendant's new contention. It is apparently the theory of the Defendant that when Border Patrol Agent Cantu reached the back of the bus, he was required by law to jump out the back window or to race to the front of the bus and jump out the door. He did neither, because he was required to do neither. Instead, after briefly questioning all the passengers and looking inside the bathroom, he began to work his way back to the front of the bus. In the course of doing so, he looked in the overhead luggage compartments.[1] Although this process may have delayed Agent Cantu's exit from the bus for a few seconds or even one or two minutes, the delay was trivial and inconsequential. It was certainly not

[1] The motion to reconsider states as a fact that the luggage compartments were incapable of concealing an undocumented alien. The Court does not recall the testimony that way. Although it might be considered improbable, it was not impossible for an alien to conceal himself or herself in the luggage compartments.

sufficient to convert this minimally intrusive detention of a bus at a fixed checkpoint into something forbidden by the Fourth Amendment. **See: United States v. Bengivenga**, 845 F.2d 593 (5th Cir. 1988)(en banc), **cert. denied** 488 U.S. 924 (1988). It is equally clear that the minimally intrusive touching of the exterior of a bag located in the luggage compartment was neither a search nor a seizure within the meaning of the Fourth Amendment. **United States v. Lovell**, 849 F.2d 910 (5th Cir. 1988); **United States v. Garcia**, 849 F.2d 917 (5th Cir. 1988).

It is therefore ORDERED that the motion of Defendant Bond to reconsider the order denying his motion to suppress evidence be, and it is hereby, DENIED.

SIGNED AND ENTERED this 13th day of November, 1997.

HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

No. 98-9349

In the Supreme Court of the United States

October Term, 1998

STEVEN DEWAYNE BOND, PETITIONER,

v.

UNITED STATES OF AMERICA

Supreme Court, U.S.
FILED
MAY 10 1999
OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

The undersigned, an attorney, a member of the Bar of this Court, certifies that pursuant to Rule 29.3, Supreme Court Rules, she served the within Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari on Counsel for the United States, and counsel for other parties required to be served, by enclosing a copy of each in an envelope, with first-class postage prepaid, addressed to their post office addresses:

The Honorable Seth P. Waxman
Solicitor General of the United States
U.S. Department of Justice
10th Street and Constitution Ave., NW, Room 5614
Washington, D.C. 20530
(202) 514-2201

and depositing same in a United States mailbox at San Antonio, Texas, on May 10, 1999. Counsel further certifies that all parties required to be served have been served.

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